Lee Ah Ba v Md Noor bin Ariffin & Anor

HIGH COURT (ALOR SETAR) — CIVIL APPEAL NO 12-55-89
KC VOHRAH J
19 JUNE 1990

Civil Procedure — Striking out of action — Inherent jurisdiction and discretion of court — Fitness to attend court — Want of prosecution — Delay not caused by plaintiff — Duty of judge when reviewing decision — Power of appellate court to review decision — Subordinate Courts Rules 1980, O 24 & O 28 — Medical Regulations 1974, reg 24A

The plaintiff failed to appear for the hearing of his accident claim for general and special damages. The trial judge refused an adjournment and struck out the claim. The same judge also dismissed the plaintiff's application to set aside the order striking out the claim. The plaintiff appealed.

Held, allowing the plaintiff's appeal:

(1) In exercising its discretionary power to grant adjournments, a court ought not to make an order that would defeat the rights of a party and destroy them altogether unless satisfied that the party concerned has been guilty of such conduct that justice can only be properly done to the other party by coming to that conclusion.

(2) As the granting of an adjournment is a matter of discretion, an appellate court will be slow to interfere with the decision of the court of original jurisdiction. However, the decision of a judge, being a judicial act, is still subject to review as to whether it was properly exercised.

(3) The trial judge had failed to properly consider the plaintiff's reasons for not appearing at the trial and incorrectly concluded that the plaintiff had been responsible for the long delay in getting the case ready for trial.

(4) The trial judge's order striking out the plaintiff's claim after refusing to adjourn the trial was not properly made and served to defeat the plaintiff's rights altogether.

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 04-14 of 1990.]

Cases referred to

1 *Maxwell* v *Keun* [1928] 1 KB 645 (folld)
2 *Mohanlal Gordhandas Sheth* v *Ban Guan & Co* [1956] MLJ 13 (folld)
3 *Palaniappa Chettiar* v *Arunalsalam Chettiar* (FM Civil Appeal No 34/35) (unreported) (folld)
4 *Tan Eng Hoe* v *Liang Hooi Kiang* [1961] MLJ 119 (folld)
5 *Dick* v *Piller* [1943] KB 497 (refd)
6 *Priddle* v *Fisher & Sons* [1963] 3 All ER 506 (refd)
7 *Kishen Singh* v *Low Kee* (1923) 5 FMSLR 3 (refd)
8 *Haji Yahia* v *Bukah* (1929) 7 FMSLR 86 (refd)
9 *Hup San Timber Trading Co Sdn Bhd* v *Tan Ah Lan* [1979] 1 MLJ 238 (folld)

Legislation referred to

Medical Regulations 1974 reg 24A
Subordinate Courts Rules 1980 O 24, O 28

Christopher Foo for the plaintiff.
Gerard Chan for the defendants.
NT Vello for the third parties.

Cur Adv Vult

KC Vohrah J: An accident claim for general and special damages against the first defendant (a bus driver) and the second defendant (the owner of the bus driven by the first defendant), first registered in the High Court in 1977 and then transferred to the sessions court in 1989, came up for hearing before the judge of the sessions court, Alor Setar, on 3 July 1989. The plaintiff was absent but his counsel, defence counsel and counsel for the third parties were present. The learned judge refused adjournment of the trial and struck out the claim.

The plaintiff filed an application to set aside the order of the learned judge under O 24 r 8(1). The judge refused to set aside his earlier order as he was of the view that 'the plaintiff had not shown sufficient cause for his absence' on 3 July 1989. Hence this appeal.

In exercising its discretionary power to grant adjournments, a court would have to proceed on the basis of what is laid down by Atkins LJ in the case of *Maxwell* v *Keun*[1] at p 657 in the following passage:

> ... in the exercise of a proper judicial discretion no judge ought to make such an order as would defeat the rights of a party and destroy them altogether, unless he is satisfied that he has been guilty of such conduct that justice can only be properly done to the other party by coming to that conclusion.

The adjournment of a proceeding under a rule or under the inherent jurisdiction is a judicial act which may be reviewed on appeal but as it is a matter of discretion the Court of Appeal will be slow to interfere (*Maxwell* v *Keun*[1] followed locally in *Mohanlal Gordhandas Sheth* v *Ban Guan & Co*;[2] see also passage in *Palaniappa Chettiar* v *Arunalsalam Chettiar*[3] cited in *Tan Eng Hoe* v *Liang Hooi Kiang*[4] at p 120). Although in the present case the learned judge has himself reviewed his earlier decision, his later decision, being a judicial act, is still subject to review as to whether it was properly exercised, though the appeal court will be slow to interfere with his discretion. Though slow to interfere, appeal courts have intervened in the interest of justice as can be seen in the cases of *Dick* v *Piller*[5] (adjournment on production of medical certificates that were not objected to), *Priddle* v *Fisher & Sons*[6] (adjournment on bona fide telephone message of inability to attend hearing), *Kishen Singh* v *Low Kee*[7] (adjournment to procure attendance of witness who failed to attend in compliance with summons), *Haji Yahia* v *Bukah*[8] (adjournment as attorney was ill), *Mohanlal Gordhandas Sheth* v *Ban Guan & Co*[2] (adjournment as party absent was overseas, not aware of date of hearing), and the Supreme Court case of *Hup San Timber Trading Co Sdn Bhd* v *Tan Ah Lan*[9] (adjournment since there was doubt as to real reason for inability of defendant to attend court).

For the instant case, it would be necessary to look at the events which took place on the date for which the case was set down for trial. These appear from the

grounds of judgment and the notes of proceedings of the judge. According to the grounds of judgment of the learned judge, the plaintiff's counsel 'explained that another firm of solicitors in Kuala Lumpur would be taking over conduct of the plaintiff's case but he neither knew when (sic) nor why the plaintiff was absent despite being notified'. The learned judge refused an adjournment and struck out the case. He relied on two grounds to strike out the suit; first, 'on finding the said explanation to be wholly unsatisfactory' and, secondly, 'due to the strenuous objections by the defendant's and third parties' counsel' and these objections to any adjournment were in relation to the purported delay in the plaintiff prosecuting his claim. It has to be noted at this stage that the judge had unfortunately misread his notes of the proceedings when he said the plaintiff's counsel 'neither knew when (sic) or why the plaintiff was absent despite being notified', because the relevant portion of his notes of proceedings reads as follows (translated from Bahasa Malaysia):

> Encik Choe: Plaintiff is absent. In fact M/s Murphy and Dunbar wishes to take over this case for the plaintiff but have not done so. Have told defendant case cannot go on.

There is nothing in the notes to indicate that the plaintiff's counsel ventured to give any explanation for the plaintiff's absence. Nor did counsel for defendants or counsel for third parties state at that stage that counsel for the plaintiff had earlier indicated to them that the plaintiff would be absent at the date of hearing. In misreading his notes the learned judge was under the impression that the plaintiff did not attend court deliberately whereas the reason offered by the plaintiff's counsel was that another firm of solicitors intended to take over the case and had not done so and that he had informed the defendant that the case could not go on.

In seeking reinstatement of his claim the plaintiff swore out an affidavit in which he claimed he was ill that morning. He averred that he was suffering from hypertension and concomitant giddy spells. He claimed that on the morning of the trial date when he woke up he felt giddy and as he was alone, his wife having gone to the market, he could not go to court nor contact his counsel. He averred that when his wife returned at 10.30am she contacted his counsel and was told the case had been struck out. And he consulted a doctor at 11.30am for his sickness.

He exhibited two certificates, purportedly 'medical certificates'. One was a 'To whom it may concern' letter dated 11 July 1989 from a doctor stating that on 3 July 1989 (the date of the trial) he saw the plaintiff in the morning for giddiness. The doctor stated that the plaintiff was a known case of mild to moderate hypertension and was under his treatment; that he had recurrent attacks of giddiness which were relieved by rest and medicine and that he was advised rest and requested to continue with medicine at home.

The second was a 'certificate' from the same doctor issued about two years earlier dated 18 September 1987 stating that the plaintiff was suffering from hypertension with giddiness and was not able to attend work/school for two days (18 September to 20 September 1987) and that he had to be examined again on the 20 September 1987. The judge rejected both documents as being defective; he said neither was 'a certificate of unfitness to attend court' as required under reg 24A of the Medical Regulations 1974.

The judge observed that the document for the purported illness on 3 July 1989 was dated 11 July 1989 and did not state whether the defendant could attend court on 3 July 1989. As for the document dated 18 September 1987 he rejected it as having no relevance at all as the dates for the plaintiff's inability to attend work/school were 19 September 1989 and 20 September 1987 and were unrelated dates. With respect I think the learned judge missed the point. Although neither of the two documents is in the form required by the said regulation which is to the effect that 'a certificate of unfitness to attend court as a witness shall be in Form 14' in the Schedule to the Regulations, it is clear that the two documents were not for the purpose of showing that the plaintiff 'will be unfit to attend court to give evidence' (see Form 14) but to corroborate the plaintiff's story that he did indeed have a history of hypertension and giddiness and that the plaintiff had seen the doctor on the morning of 3 July 1989, the date of trial, for giddiness and that he was requested to rest and take medicine. There was no contention at all that the statements in the medical certificates were not accurate. The learned judge should not have merely considered them on the narrow issue of whether they were certificates of unfitness in prescribed form to attend court to give evidence. In any event how could the doctor possibly have given a certificate that the plaintiff would not be able to attend court in the form rigidly required by Form 14 when the medical examination was done, and this assertion of the plaintiff is not challenged, after the hearing was over? The judge should have considered whether the certificates bore out the plaintiff's story that he suffered from hypertension and giddy spells and that on that fateful morning he suffered a giddy spell and being alone, he could not contact his counsel until his wife came back from market.

If he had considered the two certificates in that context and then had rejected the plaintiff's story then his decision and his reasoning on the matter cannot be impunged. Instead he summarily rejected the documents on a technicality without deciding whether it could probably have been true that the plaintiff was sick and therefore absent that morning.

Now when the judge struck out the claim he also relied on another ground as stated earlier. The complaint was that the suit was filed in 1977 and was still pending hearing after 12 years and that the plaintiff had done nothing to prosecute his case expeditiously and that in the meantime the first defendant had died and was unable to testify. It is quite obvious the judge seriously considered and accepted the truth of that allegation when he struck out the case on 3 July 1989 because in the first paragraph of his judgment he observed, 'Whilst in the High Court, the plaintiff had apparently not taken sufficient steps to prosecute the claim expediently.' The point is that the allegation of delay on the part of the plaintiff was a general one and the plaintiff's counsel had disputed this at that hearing on 3 July 1989 and had stated that the delay was occasioned in the High Court. But clearly the learned judge had the impression that the delay was caused by the plaintiff when he struck out his claim.

In regard to this second matter of the plaintiff not presenting his case expeditiously, it is necessary to look at the facts brought out in the plaintiff's affidavit when he applied for the reinstatement of his claim under O 28 r 8(1) of the Subordinate Courts Rules 1980. The accident claim was filed as a civil suit in the High Court in 1977 but was transferred to the sessions court, Alor Setar in February 1989. The plaintiff appeared in the High Court everytime the matter came up before the High Court. This was not disputed. On 20 July 1983, the plaintiff's counsel requested for the case to be transferred to the fixing list but it was not fixed for hearing until a request was made by the plaintiff on 8 December 1985 for an early date whereupon on 15 March 1986 the senior assistant registrar wrote to the parties concerned that the case was fixed for hearing from 24 to 27 August 1986. Not that this is unusual but certainly the plaintiff cannot be blamed for a late hearing date. In any event, the court took off these dates on 19 August 1986. Then on 3 September 1986, the plaintiff's counsel was informed that the first defendant had died and counsel then wrote to the defendant's solicitors requesting them to state whether they were applying for representation for the first defendant and following the defence solicitors' refusal to apply for representation, the plaintiff's counsel applied to the High Court and obtained on 20 September 1987 an order for the action to be proceeded on in the absence of the first defendant. The case was then fixed for hearing on 8 March 1989 and then refixed for 14 March 1989 but on 27 February 1989 the High Court notified the parties that the case had been transferred to the sessions court, Alor Setar. The sessions court, Alor Setar fixed the case for hearing on 3 July 1989 and on that day, that one day, for the first time the plaintiff failed to turn up.

I have set out the facts in some detail in the preceding paragraph to show that it is incorrect to state that the plaintiff was responsible for the long delay in getting the case ready for trial. It is clear that things were beyond his control and with respect the learned judge did not consider whether he (the judge) was right in relying on the delay on the part of the plaintiff (as stated in his judgment) for striking out the claim. In other words while the learned judge also relied on the alleged delay of the plaintiff to strike out the plaintiff's claim he did not reconsider this ground when dismissing the application for the reinstatement. He should have evaluated the facts disclosed in the affidavits which showed that the plaintiff was not responsible for the delay in the case coming up for trial. The judge should have reconsidered whether he was justified in relying on the alleged delay of the plaintiff when he struck out the plaintiff's claim.

With respect, if the judge had considered the so-called medical certificates as tending to show that the plaintiff had hypertension with giddy spells and had not rejected them on a technicality, he would then have properly directed his mind as to whether the plaintiff was sick with hypertension that morning and therefore was unable to come to court. And if he had evaluated the facts adduced relating to the delay before the case came up for trial, the adverse impression existing in the mind of the judge earlier (and which also led him to strike out the claim) that the plaintiff was responsible for the delay in the case coming up for hearing would have been dispelled. With respect to the learned judge, the order he made striking out the plaintiff's claim after refusing to adjourn the trial was not properly made and served to defeat the plaintiff's rights altogether. In the circumstances, I allowed the appeal of the plaintiff and reinstated the case. I made no order as to costs.

Appeal allowed.

Solicitors: *Murphy & Dunbar; Lim Kean Siew & Co; Vello & Associates.*

Reported by *Mathavan Devadas*